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### UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Thirty-first session

#### SUMMARY RECORD OF THE 639th MEETING

Held at Headquarters, New York,  
on  
Thursday, 4 June 1998, at 3 p.m.

Chairman:

Mr. MAZILU

(Romania)

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The meeting was called to order at 3.05 p.m.

ELECTION OF OFFICERS (continued)

1. Mr. TELL (France) nominated Mr. Renger (Germany), Mr. LEE (Singapore) nominated Ms. Nikanjam (Islamic Republic of Iran) and Mr. ENIE (Observer for Gabon) nominated Mr. Enouga (Cameroon) for the three offices of Vice-Chairman.

2. Mr. Renger (Germany), Ms. Nikanjam (Islamic Republic of Iran) and Mr. Enouga (Cameroon) were elected Vice Chairmen by acclamation.

PRIVATELY FINANCED INFRASTRUCTURE PROJECTS (continued) (A/CN.9/444/Add.4)

3. The CHAIRMAN invited the Commission to resume its consideration of draft chapter III of the legislative guide on privately financed infrastructure projects (A/CN.9/444/Add.4).

Paragraphs 15-25

4. Mr. OLIVENCIA RUIZ (Spain) thanked the secretariat for the terminological explanations provided. He said that his delegation could accept the proposal of "company" ("compañía") or "corporation" ("sociedad") to designate concessionaires in privately financed infrastructure projects. However, it was very important to standardize the terminology used throughout the document.

5. He also concurred with the choice of the Spanish term "empresa" ("company") in paragraph 16. However, he objected to the translation of "maitre d'ouvrage" in paragraph 21, as "maestro de obra", which should be replaced by "dueño de obra" or "contratista".

6. Mr. CHOUKEI (Observer for Morocco) said that the continuation of negotiations between the awarding authority and consortia throughout the duration of the concession was not a new phenomenon. He asked the secretariat to amend the text to make it clear that negotiations on unforeseen or emergency situations, or matters which were not covered in the guide, should not be construed as a revision of the content of the contract or its terms. Nor should they be viewed as a reopening of contract negotiations.

7. Mr. ESTRELLA FARIA (International Trade Law Branch) asked the Observer for Sweden to elaborate on his query relating to legislative recommendation 2.

8. Mr. LAMBERTZ (Observer for Sweden) said that recommendation 2 was substantively sound and he did not object to its wording, but he wondered whether it was suitable for inclusion in the legislative guide.

9. Mr. FOVAF (United States of America) said that he agreed with the Observer for Sweden. The ultimate purpose of recommendations should be the prompt consideration.

Paragraphs 26-32

10. Mr. WALLACE (United States of America) suggested that an explanation should be added to paragraph 31 to illustrate how the precise presentation of standard contract terms would facilitate the entire process, including funding.

11. Ms. GIOIA (Italy) drew the attention of the Commission to the fact that paragraphs 21 to 37 were not directly covered by any of the recommendations.

12. Mr. ESTRELLA FARIA (International Trade Law Branch) explained that investors and lenders had often cited inadequate preparation as a major difficulty they encountered in the bidding process. The secretariat had not been able to formulate a legislative recommendation to address that issue.

13. Mr. GUISLAIN (Observer for the World Bank) said that in addition to appointing the award committee, as highlighted in paragraph 27, it was also important to appoint technical experts and advisers to host governments.

14. He suggested that either "pre-feasibility study" or "preliminary feasibility study" would more accurately convey the intention of paragraphs 28 and 29, since the term "feasibility study" described a very specific and involved process.

15. He asked whether "standard contract", in paragraph 31, referred to a model or a draft contract.

16. Ms. GÜRAY (Observer for Turkey) suggested that section 8.3 should be expanded to stress the benefit of involving lenders and guarantors as early as possible in the process.

17. Mr. KOVAR (United States of America) said that feasibility studies should ordinarily be made available to inform bidders of the various factors governments took into account.

18. Environmental impact assessments should be among the considerations in the overall process of feasibility assessment. However, in that connection he drew attention to the intended purpose of the reference to environmental impact in paragraph 68 (d).

Paragraphs 33-46

19. Mr. WALLACE (United States of America), in response to the comment made by the representative of Italy, said that legislative recommendation 2 suggested that the narrowing-down of proposals was covered in paragraphs 19 and 20. Those paragraphs pointed out the inadvisability of open tendering without a prequalification phase; by contrast, paragraph 33 stressed the need for a rigorous procedure to limit the number of prospective proponents. Paragraph 33 should also be clarified to show how prequalification proceedings for privately financed infrastructure projects did not violate any generally accepted prohibitions.

20. The ability to manage financing and to maintain cordial relations with host governments were important qualification requirements of proponents, and as such, should be included in the last sentence of paragraph 36. He also pointed out that article XVI of the General Agreement on Trade in Services, concluded under the auspices of the World Trade Organization, prohibited the type of limitations placed on bidders in the last sentence of paragraph 37.

21. In the final sentence of paragraph 40, the word "advisable" should be replaced by "mandatory".

22. In conclusion, he asked whether paragraphs 41 and 42 applied to the compensation of costs for both successful and unsuccessful bidders.

23. Mr. GUISLAIN (Observer for the World Bank) pointed out that "prequalification" had a specific meaning in the granting of concessions, and that all companies which met the prequalification criteria should be allowed to submit bids. He believed "preselection" was a more suitable term for section F.

24. Referring to the second sentence of paragraph 35, he said that since the content of the prequalification document could bind the bidder at a later stage it might not be advisable for the proponent to provide too much information on the principal required terms of the project agreement.

25. Furthermore, he found the stipulations in paragraph 44 too strict. For many countries the exercise of bidding for infrastructure projects was a lengthy learning experience; it was therefore important to allow a certain degree of flexibility in the procedure. He was not in favour of the use of a rating system (para. 45), since prequalification was a stage at which a large margin of discretion was acceptable.

26. Mr. CHOUKRI (Observer for Morocco) said that host governments sometimes had an urgent need to establish a particular infrastructure project. The draft guide should therefore provide for the prequalification proceedings to be conducted within a relatively short time-frame and at a reasonable cost. He did not share the view that, where a project could not proceed, the awarding authority should consider arrangements for compensating prequalified proponents. To do so would place an intolerable burden on the treasury of host States, which might seek ways of avoiding the payment and thereby lower the quality of the competition.

27. Mr. WALLACE (United States of America) said that the point just raised by the Observer for Morocco was valid. However, the more efficient the selection process was the lower the cost of participation would be and the less necessary would it be for the guide to provide for compensation arrangements. His delegation was not urging the inclusion in the guide of compensation provisions. It merely wished the guide to draw that aspect of the selection process to the attention of governments.

28. Mr. LALLIOT (France) said that his delegation would be reluctant to support the inclusion in the guide of any provision for preferential treatment to be given to domestic entities. But it could understand why some States might wish to include such a provision. Should the Commission decide to include the

provision, however, it must be carefully formulated so as not to legitimize discrimination on the basis of nationality.

29. With regard to recommendation 6, given the complexity of the contracts involved, the guide should not attempt to legislate every aspect of the criteria, requirements or procedures with respect to the qualifications of project consortia. The principle of negotiation must be respected and a sufficient margin of manoeuvre allowed so that supply could be adjusted to demand and the effectiveness of the entire process thereby enhanced.

30. On the subject of compensating prequalified proponents if a project could not go forward, it was logical to envisage cost-recovery provisions in certain cases, since failure to do so would limit the interest of potential applicants.

31. Lastly, users might find it easier to follow the legislative guide if references to other texts, such as the UNCITRAL Model Law, restated the provisions of the text in question instead of merely citing the article in which it was contained.

32. Ms. STREYEVA (Russian Federation) asked whether the statement in paragraph 38 that "interested companies typically participate in the selection proceedings through consortia especially formed for that purpose" meant that only consortia of companies could participate in the proceedings. If that was the case, then the first sentence of paragraph 38 was unnecessary.

33. She noted that most of the guarantees provided in the guide were for the benefit of the host government. It was also important to provide guarantees for the benefit of the project consortia.

34. Lastly, the guide should make it clear whether the private sources of financing for infrastructure projects to which it referred were foreign or domestic. The references appeared to be to foreign sources of financing.

35. Mr. ESTRELLA FARIA (International Trade Law Branch), responding to the last point raised by the representative of the Russian Federation, said that the guide was neutral on the subject of the sources of financing. It was certainly not the intention to exclude the possibility of financing by local sponsors. The question concerning the establishment of consortia appeared to have been prompted by the choice of Spanish terms used to render the English original, which was quite clear.

#### Paragraphs 47-65

36. Mr. WALLACE (United States of America) said that, following the submission by project consortia of proposals relating to broad output specifications and contractual terms, it was unclear whether the next stage consisted of negotiations or discussions between the proponent and the awarding authority, prior to the revision of the proposals. With reference to paragraph 56, he wondered whether there was any real need for alternative proposals if the selection proceedings were divided up into two stages. Lastly, paragraphs 61 and 64, which referred to procedures for clarification did not make it clear when such clarification took place.

37. Mr. ESTRELLA FARIA (International Trade Law Branch), responding to the points raised by the representative of the United States, said that the awarding authority discussed initial proposals with their respective proponents, following which it invited the proponents to submit final proposals that took account, where applicable, of the revised specifications and contractual terms. The alternative proposals provided for in paragraph 56 were subject to the caveat contained in the last sentence of paragraph 47. Lastly, on the question of when clarification of the request for proposals took place, paragraph 61 simply stated that the request for proposals must provide information on the means by which project consortia might seek clarifications of the request for proposals, while paragraphs 64 and 65 established the procedures for doing so.

38. Mr. RENGEE (Germany) noted that recommendation 8 was entitled "Initial request for proposals", while the body of the recommendation referred to structuring the proceedings for requesting proposals in two stages. An effort should be made to ensure consistency between the title and the text of the recommendation.

39. Mr. GUISLAIN (Observer for the World Bank) noted that there were different ways of implementing a two-stage selection procedure. While a unified bidding document usually emerged by the completion of the second stage, in some systems the awarding authority might still allow a degree of flexibility in the final proposal; the guide should therefore include provision for the latter approach. He agreed that the word "negotiations" in paragraphs 51 and 52 should be replaced by "discussions".

40. In formulating its revised specifications, the awarding authority should not indicate a preference for any specific design or technology so as not to exclude any proponent. It should, however, provide that even where the facility reverted to the government after the end of the concession period, it must continue to meet certain output requirements.

41. On the subject of ancillary revenue sources, few infrastructure projects could be wholly funded from the revenue stream which they generated. As a result, a concessionaire who operated a toll road, for example, might also be granted the right to develop commercial property along the road.

42. Lastly, the example of "local telephone companies", which was cited in paragraph 62 as an illustration of a market dominated by one enterprise, might more accurately be replaced by "power generators".

43. Mr. WALLACE (United States of America) said that the awarding authority should formulate clear criteria for evaluating proposals not only during the selection phase but also during the longer-term operational phase.

The meeting was suspended at 4.25 p.m. and resumed at 5 p.m.

Paragraphs 66-74

44. Mr. WALLACE (United States of America) said that legislative recommendation 12 appeared to suggest that the bidder should supply the items listed in the recommendation when in fact governments should include those items

in the request for proposals. The recommendation should therefore be reworded for clarity.

45. He believed that in legislative recommendation 13, an additional item should be included: the financial commitments of the bidder - whether the bidder had discussed the project with its bankers and was in possession of letters of intent or other indication that financing was available - should be included in requests for proposals.

46. Turning to related paragraphs 66 to 69, he suggested that mention should be made of the phrase "best and final offer", which was well known to those involved with procurement.

47. Paragraph 68 included disclosure provisions for bidders, of which not all might be acceptable to those bidders. The provision in subparagraph (c) on disclosure of bidders' internal rates of return would be particularly troublesome.

48. Paragraph 73 recommended that for evaluation criteria awarding authorities should not limit themselves to comparisons of unit prices. Perhaps not enough emphasis had been given to alternatives: while the unit price approach might generally be the right tack to take, there were occasions when it would be foolish.

49. Ms. GUREYEVA (Russian Federation) said that she could not fully concur with the previous speaker, first on his point that recommendation 12 and paragraph 66 contained items that should be laid down by governments rather than provided by companies: indeed, the "specifications and schedule of works" referred to in recommendation 12 (a) could serve as criteria for governments to select which bidder they preferred.

50. Second, although it was quite true that some companies might be unwilling to disclose their internal rates of return, what was actually needed was a system for protecting the confidentiality of information, including price information. In the absence of such price information, governments could hardly come to adequate decisions on projects.

51. Mr. GUISLAIN (Observer for the World Bank) said that he concurred with the representative of the United States in respect of recommendation 12 and paragraph 66: greater clarity was indeed needed. Also, to continue the Bank's consistent emphasis on the service provided, rather than the works carried out, the list of items to be included in technical proposals should include roll-out of services and performance standards, which included but were not restricted to quality standards.

52. He concurred with the representative of the United States also in respect of paragraph 68 (c) on the issue of disclosure of internal rates of return. Disclosure of rates of return might be appropriate in some circumstances, but one had to know to what effect governments would use such information: it might be legitimate to require disclosure if the purpose was to ensure that the bidder had done his homework, but if it was, as many countries found tempting, to determine whether the rates were too high, that would be unacceptable.

especially in a competitive bidding situation: it was irrelevant whether a bidder managed to make a large profit as long as the bid was the best.

53. He believed that before the subject of evaluation criteria was broached, in paragraphs 72 to 74, the text should first tackle qualification criteria, as in paragraphs 76 and, obliquely, 77, either under a separate sub-heading or by changing the heading "evaluation criteria" to "qualification and evaluation criteria". After all, there was no point in evaluating the proposals of firms that did not meet the qualification criteria.

54. Also, it might be advisable to extend the list of qualification criteria, and in that respect he disagreed with the representative of the United States: selecting a bidder on the basis of the lowest tariff offered was a valid procedure, it being understood that the other performance criteria must be clearly set. The aim of any project was to provide the best service at the lowest price, and unit price was the standard method of selection, and even the sole one in the power industry. In such circumstances, it became more important to get the pre-qualification and qualification criteria right.

55. Mr. LALLIOT (France) said that in the specific context of the paragraphs under discussion and also generally, a clear distinction should be drawn between the negotiation and discussion phase, where the broad technical, commercial and financial parameters were set, and the final stage of contract negotiations between the future parties to the contract - the procuring entity and the successful bidder.

56. Bidders had to be selected on the basis of objective criteria in their bids; in that connection, he supported those speakers who had mentioned the need for technical, commercial and financial confidentiality in respect of bids. Also, if the text under discussion were to require too much disclosure from bidders during the discussion and negotiation phase, excess publicity was always a risk and one that would put potential bidders off bidding.

57. In the final version of the text under discussion, in addition to the distinction between the discussion and the final negotiation stages, care must be taken not to give the impression that contracts were negotiated pre-selection.

58. He noted that European Union Directive 93/37/EEC concerning the coordination of procedures for the award of public works contracts made the distinctions he had drawn very clear. The model notice of public works concession and other related model notices drawn up under that directive were more expeditious than the text before the Commission and maintained the discretionary room for manoeuvre in the negotiations that was needed for the important reasons of confidentiality, efficiency and security.

59. Turning to the issue of the unit price criterion as discussed by the Observer for the World Bank, he said that some contracts could not be awarded on a unit-price basis, which point must be made more clearly and firmly than it was in the text under discussion: there were parameters that had to do with the public interest, quality and equality of access and the like that must have a

bearing on procurement and the award of contracts, making it simplistic to rely solely on the unit price.

60. Mr. MARADIAGA (Honduras), referring to paragraph 68 (c) on financial viability, said that the expected financial internal rate of return, when fixed directly by the State or determined on the basis of legal provisions, might have an impact on the price set in the contract. That should be taken into account. The language of paragraph 70 on tender securities should be more positive.

61. As a newer member of the Commission, his delegation would appreciate having access to all UNCITRAL documentation.

62. Ms. FOLLIOT (France) requested an explanation of the relationship between the final sentence of paragraph 72, concerning pre-qualification criteria, and the final sentence of paragraph 60.

63. Mr. ESTRELLA FARIA (International Trade Law Branch) said that the intent of the final sentence of paragraph 72 was to ensure that an evaluation of pre-qualification criteria whose results had been positive would not be repeated in the final stage of selection.

#### Paragraphs 75-80

64. Mr. ENIE (Observer for Gabon), referring to the first sentence of paragraph 75, said that it should be sufficient to specify the date of the opening of proposals without going into detail about the time.

65. Mr. ESTRELLA FARIA (International Trade Law Branch) said that the reference to time was based on the provisions of article 33 of the UNCITRAL Model Law. It was designed to protect and preserve confidentiality and reassure consortia that nothing in their proposals would be changed until such time as the proposal was publicly opened in the presence of their representatives. Specifying only the date was not sufficient, since it could conceivably permit the opening of proposals before the actual time at which the representatives of the consortia were present.

66. Mr. WALLACE (United States of America) said that the secretariat should think about the remarks made by the Observer for Gabon; in the context of the procurement of services, the examination of proposals upon the opening of bids was probably not thorough. Referring to paragraph 76, he asked whether bids could be rejected on the grounds that they were not *prima facie* responsive in the first stage as well as the second stage; in some cases, it might be clear from the outset that bids did not meet that criterion. He wondered how strictly the separate consideration of price and non-price factors (para. 77) would be adhered to. Lastly, with regard to the second sentence of paragraph 77, he said that selection criteria must be made clear in requests for proposals; they should not be left to the discretion of the awarding authority.

67. Mr. GUISLAIN (Observer for the World Bank) said that the pre-qualification criteria referred to in paragraph 72 were often reapplied in the second stage in order to ensure that the consortium had not undergone major changes. Referring to paragraph 76, he said that "incomplete" and "partial" were not the sole

determinants of unresponsiveness; a proposal would also be unresponsive if it was in direct contradiction with some of the specifications of the request.

68. He had never said that all contracts should be awarded on a lowest-price basis. Rather he had merely indicated that certain contracts, such as those for the production of electricity, were typically awarded on that basis. That factor was taken into account in paragraph 77 but not in paragraph 73. The opening of proposals described in paragraph 75 was a key element of transparency and, therefore, absolutely necessary. Since all bids must be opened at the same time and in the same place, it was vital to specify both the date and the hour. The examination upon opening was not thoroughgoing but rather a formal verification that all required documents had been submitted. The words "or consumers" should be added after "to the detriment of the host Government ..." in paragraph 78. Lastly, the wording of paragraph 80 (g) should be sufficiently broad to convey that the awarding authority was not necessarily the one to monitor the contract in every case. "Monitoring rights of the Government" might be a more appropriate phrase.

69. Mr. LAMBERTZ (Observer for Sweden) said that he supported the remarks made by the representative of the United States. Perhaps the first sentences of both recommendation 17 and paragraph 77 should be added to the text of recommendation 16 on opening, comparison and evaluation of proposals, which was supposed to constitute legislative advice. It might also be useful to develop the recommendation on the basis of the UNCITRAL Model Law, particularly article 34 on successful tender.

The meeting rose at 6 p.m.